

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DEVEL STEWART,

Defendant-Appellant.

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UNPUBLISHED

March 25, 2014

No. 313097

Macomb Circuit Court

LC No. 2012-000569-FC

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant, Larry Devel Stewart, appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a. The trial court sentenced him to life imprisonment for the first-degree felony murder conviction, two years’ imprisonment for the felony-firearm conviction, 25 to 50 years’ imprisonment for the armed robbery conviction, and 25 to 50 years’ imprisonment for the conspiracy to commit armed robbery conviction. We affirm.

The prosecution presented evidence at trial to establish that defendant ambushed and shot Kevin Brown in a botched robbery attempt that was set up when his girlfriend and codefendant, Renyatta Hamilton, lured Brown to the apartment complex where she was staying. Brown sustained four gunshot wounds in the incident and later died from his injuries.

**I. DUE PROCESS AND FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION**

Defendant argues that he was deprived of due process and the Fifth Amendment right to silence when the prosecution referenced his post-*Miranda*<sup>1</sup> silence and request for counsel.

To preserve for appellate review the issue of the admissibility of evidence of a defendant’s silence, the defendant must testify at trial. *People v Boyd*, 470 Mich 363, 377-378;

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

682 NW2d 459 (2004). Because defendant did not object, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affected a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

The Fifth Amendment, as applied to the states through the Fourteenth Amendment, “forbids [ ] comment by the prosecution on the accused’s silence” at trial. *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013), quoting *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). “[A]fter an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.” *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009), quoting *Doyle v Ohio*, 426 US 610, 619 n 10; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, postarrest silence may be used to impeach a defendant “who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.” *Id.* at 192, quoting *Doyle*, 426 US at 619 n 11. “In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant’s testimony as to his behavior following arrest.” *Doyle*, 426 US at 619 n 11.

During cross-examination, the following exchange took place between defendant and the prosecutor:

Q. You turned yourself in a couple days [after the shooting;] that’s the first time you called the police, right?

A. I didn’t even call them then[;] I just turned myself in.

Q. You’ve never made a statement about this case until just now?

A. You’re right. No. Let me take that back.

Q. Oh, please do.

A. I made a statement to Detective Quinn and told him that . . . what I’m being charged with is not what happened.

Q. Okay.

A. There was a fistfight and [Brown] pulled a gun on me.

Q. Nope. Nope. Nope. All you told Detective Quinn was it didn’t go down that way.

A. I told him—

Q. When you wanted to talk, you wanted to talk and then you lawyered up.<sup>2</sup> That's what you did.

\* \* \*

Q. They've got you in the room. They are giving you *Miranda*. You say, that's not how it happened. I want to tell you how it happened but I want a lawyer. So they take you all the way back to the jail cell and you say, well, what if that's not how it happened? And they say, do you want to talk? And you said, yeah, let's get this done. You walked all the way back with them to the interview room, they go to Mirandize [sic] you again and you said, nope. I want a lawyer. That's what you did, right?

A. Yes, I did.

Q. So other than saying to him that's not how it happened, you didn't want to tell them how it happened. You waited until now so that I wouldn't know, nobody would know. This is your story now?

A. I was telling them that there never was a robbery. That is not how it happened.

Q. I didn't hear that in the video. I just heard you say it didn't go down that way. [“]What if it didn't go down that way[”] is how you said it and that was all you said.

A. Right. And I told them that there was a fight, when [the officer] was standing at that counter bandaging my arm for 45 minutes.

Q. You didn't get that far. Are you creating? Do you want to see the video?

A. No. I don't want to see the video.

Q. We can play the video. There is [sic] two of them. You can see, the jury can see that you didn't say squat about that.

We disagree with defendant that the prosecutor's inquiry about his previous silence violated *Doyle*. Defendant triggered the exception, *Borgne*, 483 Mich at 192-193, to the proscription against the prosecution referring to his post-*Miranda* silence when he testified that he told Detective Quinn, “[W]hat I'm being charged with is not what happened,” and that

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<sup>2</sup> Although we conclude that the prosecutor's conduct in this case did not violate *Doyle*, we do not condone his use of the phrase “lawyered up” in this context because it is derogatory towards a person's right to counsel and right to remain silent.

“[t]here was a fistfight and [Brown] pulled a gun” on him.<sup>3</sup> This amounted to an assertion that defendant was repeating the exculpatory version of events he recounted after he was read his *Miranda* rights, since he testified during direct examination that he returned to the apartment where the shooting occurred on the morning of December 19, 2011, to retrieve his shoes, and, once there, fought a heavy-set man with dreadlocks who pulled out a gun that discharged several times. The prosecutor impeached that testimony by countering that defendant vaguely told investigators either, “[I]t didn’t go down that way,” or, “[T]hat’s not how it happened,” and asked for a lawyer before continuing the interview. In this instance, the prosecutor was not using defendant’s invocation of his right to silence as evidence of his guilt, “but rather to challenge the defendant’s testimony as to his behavior following arrest.” *Doyle*, 426 US at 619 n 11.<sup>4</sup>

Defendant next asserts as error the prosecution’s questions on recross-examination concerning whether defendant spoke with police officers with an attorney present. Some context is needed for a resolution of defendant’s assertion of error. On redirect examination, defense counsel had the following exchange with defendant:

Q. All right. And you remember talking to Detective Quinn at the Clinton Township Police Department?

A. Yes, I do.

Q. And you indicate that you told him you wanted to tell him what happened?

A. Yes.

Q. But you wanted a lawyer present?

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<sup>3</sup> Defendant also argues that the prosecutor violated the *Doyle* rule with the question, “You’ve never made a statement about this case until just now?” This question was appropriate regardless of whether defendant’s postarrest, post-*Miranda* statement—“[I]t didn’t go down that way” or, “[T]hat’s not how it happened”—is interpreted as invoking his right to remain silent. The question equally invited an affirmative or negative response and was tantamount to asking, “Have you given a statement in this case before?” Had that question been asked instead, it is likely that defendant would have responded with the same answer: his assertion that he told Detective Quinn that Brown “pulled a gun” on him. Consequently, the question did not contravene *Doyle* by improperly using defendant’s postarrest, post-*Miranda* silence as evidence against him.

<sup>4</sup> Compare *People v Knapp*, 244 Mich App 361, 383-384; 624 NW2d 227 (2001), to which defendant cites for its holding that “it was improper for the prosecutor to question [a police officer] regarding [the] defendant’s invocation of his right to counsel” after a previous arrest. There was no record evidence in *Knapp* that the defendant opened the door to impeachment by testifying that he gave a similar exculpatory explanation after he was arrested. *Id.* Here, the prosecutor impeached defendant with a conflicting picture of his postarrest behavior.

A. Yes.

Q. Why?

A. Because they will try to trick you up and mix your words up with something you didn't say.

Q. Okay. So you were perfectly willing to tell them everything that happened as long as you had a lawyer present?

A. Yes, I was.

Q. All right. And they weren't interested in hearing your story with a lawyer present?

A. No, they were not.

Q. They said we don't want to talk to you?

A. Yes.

Subsequently, during recross-examination, the prosecutor again raised the issue of defendant's refusal to speak to the police without an attorney present:

Q. So after you hired Mr. Haddad you didn't turn around and tell the police, ["N]ow I want to talk[:] I've got a lawyer,[""] did you?

A. He said it was [sic] be too late by the time I got my lawyer into my preliminary examination. They wouldn't want to hear my story again.

Q. So . . . it wasn't important enough to tell your story anymore?

A. That's what they told me.

Defendant's assertion of error is meritless because his counsel opened the door to further questioning concerning whether defendant spoke to law enforcement officials with his attorney present by expressly questioning him about this issue on redirect examination. See *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). As we explained in *Allen*, "[h]aving raised the issue of his opportunity to explain his version of the events, [defendant] opened the door to a full and not just a selective development of that subject." *Id.* (quotation omitted). Nevertheless, even assuming error, defendant is not entitled to relief under plain error review because, as discussed in detail *infra*, defendant cannot show that the alleged error affected the outcome of the proceedings given the strong evidence of his guilt. *Vaughn*, 491 Mich at 665.

Defendant also raises as error a comment made by the prosecutor during closing argument. Defendant argues that the prosecutor violated his right to remain silent by stating, "I don't get how an innocent man doesn't want to tell the police their [sic] side of the story." This argument is meritless as well. This Court reviews a prosecutor's comments in context. *People v*

*Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Here, when viewing the facts in the context of the defense theory of the case, the prosecutor’s comment referred to defendant’s pre-arrest, pre-*Miranda* conduct. In pertinent part, the prosecutor argued: “I don’t get – I guess, I don’t get how an innocent man leaves the scene. I don’t get how an innocent man doesn’t want to tell the police their [sic] side of the story.” Although a prosecutor cannot comment on a defendant’s silence in the face of accusation when the defendant invokes his right to remain silent, a prosecutor may comment on a defendant’s silence before any police contact occurred. *People v Gibbs*, 299 Mich App 473, 483; 830 NW2d 821 (2013). Indeed, “[a] prosecutor may comment on a defendant’s failure to report a crime when reporting the crime would have been natural if the defendant’s version of the events were true.” *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (quotation omitted). Here, if defendant’s version of the events were true, i.e., that Brown produced the weapon and that Brown was shot during a struggle in which defendant was defending himself, it would have been natural to contact the police. Thus, the prosecutor’s comment on defendant’s pre-*Miranda* silence was not improper. See *id.*

## II. MOTION TO SEVER TRIALS AND RIGHT OF CONFRONTATION

Defendant next argues that the trial court erred when it denied his pretrial motion to sever trials or allow separate juries, and that it violated the Confrontation Clause when it admitted the out-of-court testimonial statements of defendant’s alleged coconspirator, Hamilton.

To preserve a constitutional challenge for appellate review, a defendant must first raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Because defendant did not object to the trial court’s decision to hold a joint trial and redact Hamilton’s statements, and explicitly consented, outside the presence of the jury, to the prosecution’s introduction of portions of Hamilton’s statements that were actually admitted, this issue is not preserved. *Id.* Unpreserved Confrontation Clause claims are reviewed for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763-765; *People v Walker*, 273 Mich App 56, 65-66; 728 NW2d 902 (2006). A plain error affected a defendant’s substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665. “Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Reversal is warranted only “when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . .” *Id.* (quotation omitted).

As an initial matter, defendant waived appellate review of the trial court’s order denying his motion for severance or separate juries when, at the hearing on his motion, his attorney consented to a joint trial so long as Hamilton’s police statements were redacted:

*The Court:* I would limit [the prosecution] from introducing [Hamilton’s statement] as it affects [defendant], not as it affects [Hamilton].

*Mr. Haddad (attorney for the defense):* So in other words, you would redact any reference to [defendant] from whatever statement [Hamilton] gave to law enforcement?

*The Court:* Correct.

*Mr. Haddad (attorney for the defense):* Then that makes me happy, Your Honor.

“Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue.” *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (quotation omitted). Defendant did not, however, waive the right to object to the prosecution’s subsequent introduction of Hamilton’s statements in violation of the trial court’s ruling. This issue is discussed below.

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” US Const, Am VI. See also Const 1963, art 1, § 20. The Confrontation Clause is violated when a trial court admits a codefendant’s confession that implicates the defendant at a joint trial. *Bruton v United States*, 391 US 123, 127-128; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *Pipes*, 475 Mich at 269. Further, out-of-court testimonial statements by nontestifying witnesses are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 156 L Ed 2d 177 (2004); *People v Nunley*, 491 Mich 686, 698; 821 NW2d 642 (2012). “Statements taken by police officers in the course of interrogations” are testimonial for the purposes of the Confrontation Clause. *Crawford*, 541 US at 52. “Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Id.* at 68.

The trial court admitted into evidence several testimonial statements Hamilton made to Detective Jeffrey Barbera. In pertinent part, Hamilton discussed her relationship with defendant. She also discussed how she knew Brown. Further, Hamilton told Barbera that she saw defendant with a gun the evening before the shooting, and that she contacted defendant and Brown moments before the shooting.

We disagree with defendant that all of Hamilton’s statements violated *Bruton*. Some of her statements, most notably her statements that she dated defendant and that she knew Brown, did not inculcate defendant. Thus, these statements did not violate *Bruton* because they did not implicate defendant on their face, nor did they implicate him when linked with other evidence introduced later at trial. See *Richardson v Marsh*, 481 US 200, 207-208; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Nevertheless, because, as discussed *infra*, the jury was not properly instructed that it could not use these statements against defendant, the admission of these testimonial hearsay statements violated defendant’s right of confrontation. *Id.* at 206 (explaining that a witness whose testimony is introduced at a joint trial is not considered a witness against the defendant for purposes of the Confrontation Clause if the jury is instructed not to consider the testimony against that defendant). Thus, these statements were admitted in error. *Id.*

The remainder of Hamilton's statements, most notably her statements concerning defendant's possession of a gun the evening before the robbery, as well as her statement that she contacted defendant and Brown immediately before the robbery, implicated defendant in the attempted robbery and shooting of Brown. Thus, these statements violated the rule from *Bruton*, see *id.*, and the trial court plainly erred by admitting the statements, see *Pipes*, 475 Mich at 269.

Although the trial court admitted Hamilton's statements in error, the totality of the evidence against defendant precludes the conclusion that the error was outcome-determinative because the evidence against defendant was significant, and because Hamilton's statements were cumulative to properly admitted evidence. Initially, Hamilton's statement that she dated defendant was cumulative to that of other witnesses who testified concerning the relationship. Moreover, Hamilton's statements that she knew Brown were cumulative to the admission of cellular telephone records showing that Hamilton contacted Brown on multiple occasions. Further, Hamilton's statement that she saw defendant with a gun the evening before the shooting was cumulative to properly admitted evidence because Brian May testified that he saw defendant with a gun the evening before the shooting, that defendant said the gun belonged to him, that he planned to use the gun to rob someone, and that he asked for May's assistance with the robbery. Regarding Hamilton's statements that she contacted both defendant and Brown immediately before the robbery, Barbera obtained defendant and Hamilton's cellular telephone records and determined that there were 28 separate contacts between Hamilton's phone and Brown's phone between 2:01 p.m. on December 17, 2011, and 8:41 a.m. on the morning of the shooting, December 19, 2011, and that, in the same period, there were 127 separate contacts between defendant's phone and Hamilton's phone. Additionally, as discussed *infra*, evidence of defendant's guilt was compelling. Thus, in light of the other evidence produced at trial, the erroneous admission of Hamilton's statements did not prejudice defendant. See *Pipes*, 475 Mich at 280-281.

### III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his convictions of conspiracy to commit armed robbery, and first-degree felony murder. We disagree.

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

Michigan's armed-robbery statute provides that a person who commits a robbery, "and who in the course of engaging in that conduct, possesses a dangerous weapon[,] . . . or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years." MCL 750.529. In order to establish a conspiracy, the prosecution must prove an agreement to commit a prohibited offense, but "the agreement necessary to form a conspiracy does not rise to the level of the 'meeting of the minds' concept from contract law . . . ." *People v Mass*, 464 Mich 615, 629 n 19; 628 NW2d 540 (2001). "Circumstantial evidence and reasonable inferences arising therefrom may

constitute proof of the elements of the crime.” *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

There was sufficient evidence for a rational jury to have found that the prosecution proved each element of the conspiracy to commit armed robbery charge beyond a reasonable doubt. Defendant, May, and Lane agreed that defendant and Hamilton were both present at Lane’s apartment on the night of December 18, 2011. May noticed a gun on a table inside the apartment and said that defendant wrapped it in a t-shirt later that evening. According to May, Hamilton admonished defendant to hide the gun “because if [Lane] come[s] home he might pick the [t]-shirt up” and discover the gun; Hamilton then hid the gun in her purse and left her purse on the table. After the shooting the following morning, May followed Hamilton into the apartment’s bathroom, from where she called defendant and said, “Baby, I’ve been shot.” May knew Hamilton had called defendant because defendant was “the only person [May] kn[e]w that she called [‘]baby.[‘]” Hamilton’s cellular telephone records revealed that there were 28 separate contacts between her cellular telephone and Brown’s cellular telephone between 2:01 p.m. on December 17, 2011, and 8:41 a.m. on December 19, 2011, the morning of the shooting. In the same period, there were 127 separate contacts between Hamilton’s phone and defendant’s phone. In light of this evidence, it was reasonable for the jury to have accepted the prosecution’s theory that defendant and Hamilton conspired to lure Brown to the apartment complex so that defendant could rob him.

Defendant argues on appeal that, while May testified that defendant had a gun and discussed his intention to use it to rob someone, “there was no indication in those alleged statements that [Hamilton] was included in that plan or that the conversation involved her in any way.” However, May’s testimony established that Hamilton was not only aware that defendant carried a gun, but that she was concerned enough that Lane would discover it to conceal it in her purse. Defendant next argues that although cellular telephone records showed numerous calls and text messages between defendant and Hamilton and Hamilton and Brown before and after the shooting, those records do not indicate a conspiracy to rob Brown because the substance of those conversations was unknown. Even without knowing what was said, the volume and the timing of the calls—especially the time during which Hamilton’s cellular telephone was connected to both defendant’s cellular telephone and Brown’s cellular telephone—permitted the reasonable inference that defendant and Hamilton conspired to rob Brown. See *Harverson*, 291 Mich App at 175 (explaining that this Court views the evidence in a light most favorable to the prosecution).

Defendant also argues that there was insufficient evidence to sustain his conviction of felony murder because the prosecution did not adequately prove the malice element of that offense. The elements of felony murder are:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (i.e., malice), (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]. [*Carines*, 460 Mich at 759 (quotation omitted).]

“The facts and circumstances of the killing may give rise to an inference of malice.” *Id.* “A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon.” *Id.* (internal citation omitted). Death is a foreseeable result of armed robbery. See *People v Craig*, 66 Mich App 406, 410; 239 NW2d 390 (1976) (“[T]he intentional commission of a felony such as armed robbery . . . usually involves the conscious creation of a very high degree of risk of death with knowledge of its probable consequences.”).

Defendant’s brief on appeal adopts his own narrative of the struggle between him and Brown, and proposes several alternatives to the jury’s verdict. For example, he argues that it was “just as likely that [the gun] was fired either by accident or even by Brown himself, who was the last person to have held the gun during the incident,” and it was “just as likely that [defendant] never produced or displayed a gun but [that] it emerged during the struggle and was accidentally discharged.” The first problem with this argument is that it is premised on the jury having believed defendant’s testimony when it elected not to do so. The weight of evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are to be decided by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). The more fundamental error with defendant’s arguments, though, is that suggesting equally likely explanations for defendant’s behavior and for the firing of a gun fails to establish a claim that there was insufficient evidence to support a conviction. “Although the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with [a] defendant’s innocence.” *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Therefore, there was sufficient evidence to allow a rational jury to find, beyond a reasonable doubt, that defendant acted with the requisite malice for first-degree felony murder.

#### IV. JURY INSTRUCTIONS

Defendant next argues that the trial court plainly erred when it failed to instruct the jury on the necessarily lesser included offense of involuntary manslaughter. Defendant waived review of this issue when his attorney expressed satisfaction with the jury instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). After the trial court read the instructions to the jury, it asked defendant’s attorney if he was “satisfied with the instructions as given,” and counsel responded, “Yes, I am satisfied.” Consistent with *Chapo*, defendant waived this issue.<sup>5</sup>

#### V. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed several instances of misconduct. Initially, defendant argues that the prosecutor committed misconduct by asking defendant whether May lied during his trial testimony. “Given that a prosecutor’s role and responsibility is

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<sup>5</sup> The trial court instructed the jury on the lesser included offense of second-degree murder, MCL 750.317. The verdict, guilty of first-degree felony murder, MCL 750.316(1)(b), renders this claimed error harmless. See *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998).

to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). It is improper for the prosecutor to ask a defendant to comment on the credibility of prosecution witnesses, because his or her opinion “is not probative of the matter.” *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, “[a] timely objection by defense counsel could . . . cure[] any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction.” *Id.* at 18. While the record is clear that the prosecutor erred when he asked defendant if May lied during his testimony, the error does not require reversal because a curative instruction could have alleviated any undue prejudice. *Id.*; *People v Unger*, 278 Mich App 210, 235, 237; 749 NW2d 272 (2008). Further, the trial court’s instructions directed the jury to make its own determinations regarding the credibility of each witness.

Defendant argues that the prosecutor committed misconduct when he referred to defendant’s postarrest, post-*Miranda* silence during cross-examination and closing argument. As discussed *supra*, defendant’s claims of error related to the prosecution’s use of his silence are meritless. Thus, there was no prosecutorial misconduct in this regard.

Next, defendant argues that, in several instances, the prosecutor mischaracterized evidence and referred to facts not in evidence. Defendant first cites as error the following exchanges between the prosecutor and defendant during defendant’s cross-examination:

Q. You’ve never made a statement about this case until just now?

\* \* \*

A. I made a statement to Detective Quinn and told him that . . . what I’m being charged with is not what happened.

Q. Okay.

A. There was a fistfight and [Brown] pulled a gun on me.

Q. Nope. Nope. Nope. All you told Detective Quinn was it didn’t go down that way.

A. I told him—

Q. When you wanted to talk, you wanted to talk and then you lawyered up.

\* \* \*

Q. They’ve got you in the room. They are giving you *Miranda*. You say, that’s not how it happened. I want to tell you how it happened but I want a lawyer. So they take you all the way back to the jail cell and you say, well, what if that’s not how it happened? And they say, do you want to talk? And you said, yeah, let’s get this done. You walked all the way back with them to the interview

room, they go to Mirandize [sic] you again and you said, nope. I want a lawyer. That's what you did, right?

\* \* \*

A. I was telling them that there never was a robbery. That is not how it happened.

Q. I didn't hear that in the video. I just heard you say it didn't go down that way. ["What if it didn't go down that way"] is how you said it and that was all you said.

Defendant argues that this constituted improper impeachment under MRE 613(b), but that rule explicitly does not apply to admissions of a party-opponent, and did not apply in this case because the prosecutor did not introduce extrinsic evidence of a prior inconsistent statement. The questions defendant cites were not erroneous simply because their tone was aggressive. "A defendant in a criminal case has a right to present a defense, but that right is not cloaked with protection from vigorous cross-examination." *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002).

Defendant next argues that the prosecutor, during closing argument, misrepresented Hamilton's redacted statements to police investigators. The prosecutor argued, in part:

[D]irect evidence, the phone records, which you have, which you will be able to look at which clearly shows [sic] who was calling who and when the call was being made. You have their statements. Their statements are direct evidence about [Hamilton] specifically saying it wasn't supposed to happen that way. My job was to get [Brown] to be in the apartment.

\* \* \*

It doesn't have to be a robbery. It doesn't have to be a completed act. . . . That when [defendant] did the act that caused the death of [Brown], [defendant] was committing or attempting to commit[,] or in [Hamilton's] statement, helping someone else commit the crime of armed robbery.

\* \* \*

[Hamilton] then coordinates the assault first through [defendant. Defendant] is in and out of the apartment. And I think one of the most damning things is the timing of those phone calls because she is coordinating. That's her role. When she tells [the police] that she was to get [Brown] to the apartment[,] what do you think she's doing?

A prosecutor may not argue facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Here, the prosecutor clearly committed misconduct by arguing facts that were not in evidence because Hamilton's statements referenced above were expressly excluded by the trial court. *Id.* The prosecutor should have known not to refer to Hamilton's

redacted statements because the trial court expressly excluded these statements, and the prosecutor even sought confirmation regarding what was excluded. However, in spite of this clear misconduct, defendant is not entitled to relief under plain error review. The trial court instructed the jury that the attorney's statements were not evidence. Further, the prosecutor's statement was brief and made in the midst of proper argument that circumstantial evidence showed evidence of a conspiracy, and he did not dwell on the improper argument. Additionally, a timely request for a curative instruction could have alleviated the prejudice caused by the prosecutor's improper argument, and the evidence against defendant was compelling. As such, we decline to grant defendant relief. See *Unger*, 278 Mich App at 237.

Defendant next argues that the prosecutor improperly argued that Brown was a "loving son" and uncle, and had a "loving family," when there was no record evidence to support those claims. In pertinent part, the prosecutor argued during closing:

I gave you a quote at the beginning of this trial from the movie *Gladiator*. The full quote: "is Rome worth one good man's life? We believed it once." The rest of it is: "Make us believe it again. He was a soldier of Rome. Honor him."

I don't know that Kevin Brown was a soldier, but I know that he was an uncle, he was a brother and he was a son. He has a loving family. He was someone. I ask you to honor him. I ask you to convict these two of having planned a robbery and robbed him and murdered him.

A prosecutor may not argue facts that are not in evidence, *Watson*, 245 Mich App at 588, nor may a prosecutor appeal to the jury to sympathize with the victim, *Unger*, 278 Mich App at 237. We find that the prosecutor's comments were improper because there was no evidence regarding Brown's family presented at trial, and because the prosecutor's argument was an appeal to the jury to sympathize with the jury. See *Unger*, 278 Mich App at 273; *Watson*, 245 Mich App at 588.<sup>6</sup> However, defendant is not entitled to relief under plain error review because the trial court instructed the jury that the attorney's arguments were not evidence, and that the jury was not to let sympathy affect its decision. See *Unger*, 278 Mich App at 273. Moreover, a timely request for a curative instruction could have alleviated whatever prejudice was caused by the prosecutor's improper comments; thus, defendant is not entitled to relief. *Id.*

Next, defendant accuses the prosecutor of having injected his personal opinion about the weight of the evidence into closing argument, pointing to statements such as, "I don't really think that's how it happened," "I don't get [defendant's] testimony," and "I think it's a complete lie." These statements were not erroneous. A prosecutor may neither express his personal opinion about a defendant's guilt nor may he use the prestige of his office to inject his personal

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<sup>6</sup> We note that the prosecutor attempted to use a theme from a film in order to present the case in a compelling way. Although we respect a prosecutor's desire to use a theme to deliver a more interesting and compelling trial presentation and do not wish to discourage prosecutors from engaging in colorful trial presentation, we cannot permit a prosecutor to refer to facts not in evidence or appeal to the sympathy of the jury.

opinion into the matter; however, a prosecutor may nonetheless argue all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282-283, 286; 531 NW2d 659 (1995). Here, the prosecutor's argument was not improper because he was simply arguing reasonable inferences from the evidence, and was not implying that he had any personal insight into defendant's guilt. Further, although the prosecutor frequently employed the use of the word "I" while arguing that the evidence showed defendant's guilt, such argument was not improper where it was done in the context of arguing reasonable inferences from the evidence. See *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). See also *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995) (BOYLE, J) ("The crucial inquiry is not whether the prosecutor said 'We know' or 'I know' or 'I believe,' but rather whether the prosecutor was attempting to vouch for the defendant's guilt.").

Lastly, defendant argues that the prosecutor denigrated defense counsel by addressing the flight instruction during rebuttal. During closing argument, defense counsel noted the flight instruction,<sup>7</sup> which was later read to the jury, and emphasized the portion of the instruction that a person may run for innocent reasons. Defense counsel theorized that defendant ran from the scene of the shooting in this case for innocent reasons. During rebuttal, the prosecutor responded to that argument as follows:

Finally, let me read to you, this is the kind of defense tactic crap I can't stand. The rest of that jury instruction.

"The evidence does not prove guilt if he runs and hides. A person may run and hide for innocent reasons such as panic, mistake or fear."

Let me give you the last sentence. "However, a person may also run or hide because of a consciousness of guilt." Hence, the definition of [defendant]. . . . Please convict him of everything. Thank you.

The prosecutor may not denigrate defense counsel, nor may he suggest that defense counsel is trying to mislead the jury. See *Dobek*, 274 Mich App at 67-68. Here, we find that the prosecutor's argument was a proper response to defense counsel's interpretation of the flight instruction, which did not include the part of the instruction emphasized by the prosecutor. See *People v Ackerman*, 257 Mich App 434, 453; 669 NW2d 818 (2003) (the prosecutor may respond to arguments made by defense counsel). Additionally, the prosecutor "need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66.

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<sup>7</sup> The trial court instructed the jury as follows:

There has been some evidence that the Defendant Mr. Stewart ran away after the crime he – after he was accused of the crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of the consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows that the Defendant had a guilty state of mind.

## VI EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was deprived of the effective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move for a new trial or an evidentiary hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court's review to errors apparent on the record. *Id.* Defendant neither objected nor moved for a new trial or a *Ginther* hearing; consequently, review is limited to the record.<sup>8</sup> *Id.* "Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *Vaughn*, 491 Mich at 650 (internal citations omitted).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). See also *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670 (quotation omitted), and is given "wide discretion in matters of trial strategy[.]" *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant's first ineffective-assistance argument is that his trial counsel should have objected to a jury instruction that, in his reading, "directed the jury to use [Hamilton's] out-of-court statements against" him. The instructions with which defendant takes issue are:

[T]he prosecutor has introduced evidence of statements that it claims [Hamilton] made. Before you may consider such an out-of-court statement against [her], you must first find that [she] actually made the statement as given to you. If you find that [Hamilton] did make the statement, you may give that statement whatever weight you think it deserves.

In deciding this, you should think about how and when the statements were made and about all the other evidence in this case. You may consider the

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<sup>8</sup> Defendant fairly notes in his appellate brief that the record is clear and adequate for purposes of reviewing his ineffective assistance of counsel claims.

statements when deciding the facts of the case and in deciding if you believe [defendant's] testimony here in open court.

Now, [Hamilton's] statement[s] have been admitted as evidence only as against her. It [sic] cannot be used against [defendant] and you must not do so. You must not consider her statements in any way when you decide whether [defendant] is guilty or not guilty.

If the trial court gives a correct and an incorrect instruction, "we presume that the jury followed the incorrect charge." *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Here, the trial court's instruction in the second paragraph that the jury could consider Hamilton's statements against defendant was incorrect. As noted *supra*, these statements could not be used against defendant. Although the trial court's instruction in the third paragraph clarified this error, we assume that the jury followed the incorrect instruction. *Id.* Thus, defendant's trial counsel was objectively unreasonable for failing to object to the instructional error. However, defendant is not entitled to relief because he cannot show that but for counsel's error, the result of the proceedings would have been different. See *Strickland*, 466 US at 694. Indeed, the evidence of defendant's guilt apart from Hamilton's statements was compelling. Additionally, as noted *supra*, most of Hamilton's statements were cumulative to properly admitted evidence. Thus, the trial court's erroneous instruction did not prejudice defendant, and defendant cannot succeed on his ineffective assistance of counsel claim. *Id.*

Next, defendant argues that his trial counsel should have objected to the prosecution's *Doyle* violation. As discussed *supra*, defendant failed to identify any errors in this regard. Counsel was not ineffective for failing to raise meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Lastly, defendant argues that his trial counsel failed to request a jury instruction on the necessarily lesser included offense of involuntary manslaughter. The trial court instructed the jury on the necessarily lesser included offense of second-degree murder, MCL 750.317, and the jury rejected this offense and found defendant guilty of first-degree felony murder, MCL 750.316(1)(b); this indicates that it is not reasonably probable that there would have been a different outcome had defense counsel sought to include the even lesser included offense of involuntary manslaughter. See *Sullivan*, 231 Mich App at 520.

Affirmed.

/s/ Jane M. Beckering  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Riordan